

BEFORE THE FEDERAL ELECTION COMMISSION

2014 OCT 24 AM 10:12

In the Matter of

MUR 6662

Heidi for Texas Campaign, Inc.

Heidi Thiess

CASE CLOSURE UNDER THE CELA
ENFORCEMENT PRIORITY
SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include, without limitation, an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act")¹, and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances or, where the record indicates that no violation of the Act has occurred, to make no reason to believe findings. The Office of General Counsel has scored MUR 6662 as a low-rated matter and has also determined that it should not be referred to the Alternative Dispute Resolution Office.² For the reasons set forth below, the Office of General Counsel recommends that the Commission find no reason to believe Heidi for Texas Campaign, Inc. (the "Committee"), and Heidi Thiess, violated the Act or Commission regulations in MUR 6662.

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

² The EPS rating information is as follows:
December 18, 2012.

Complaint Filed: October 9, 2012. Response Filed

1 Complainant Shawn Phillips alleges that the Committee funded communications in the form.
2 of emails on behalf of several federal candidates, and alleges that the communications did not
3 include a proper disclaimer, in violation of 52 U.S.C. § 30120 (formerly 2 U.S.C. § 441d). Compl.
4 at 2. The Complaint also alleges that the Committee failed to disclose related contributions and
5 expenditures to the Commission, in violation of 52 U.S.C. § 30104(c) and (f) (formerly 2 U.S.C.
6 § 434(c) and (f)). *Id.* The Committee was the state committee of Heidi Thiess, 2012 candidate for
7 representative of Texas' 24th state district.³

8 Attached to the Complaint are copies of what are alleged to be "mass marketing emails that
9 were sent by an email service paid for by the Heidi Thiess campaign." *Id.* at 1, Ex. A, B. The
10 Complainant avers that the emails contain "references to and electronically piggybacked upon"
11 Thiess' website, www.heidifortexas.com, which Complainant alleges was paid for by the Thiess
12 campaign. *Id.* at 1. Complainant alleges that these emails are in fact "political communications"
13 advocating on behalf of five federal candidates, and that they were distributed to more than 500
14 email addresses in substantially similar form, "and therefore were regulated communications." *Id.*

15 The alleged email communications in Exhibit A of the Complaint reference two events: a
16 voter registration drive sponsored by Thiess on April 7, 2012, and a "movie night" on April 8, 2012.
17 *Id.*, Ex. A. The communications include a list of several federal, state, and local candidates
18 expected to attend the April 7, 2012 voter drive. *Id.* The documents contain the language
19 "Copyright©2012 Heidi for Texas, All rights reserved" along with the logo, "MailChimp," a web-
20 based email management service, *see* <http://mailchimp.com/about>. *Id.* Exhibit B of the Complaint
21 contains several documents dated July 17, July 22, and July 30, 2012, respectively, each containing

³ The Texas Ethics Commission discloses two registrations affiliated with Heidi Thiess: as a candidate, disclosing "Political Expenditures from Personal Funds," <http://www.ethics.state.tx.us/php/filer.php?acct=00067820>; and as a political committee, Heidi for Texas Campaign, Inc., <http://www.ethics.state.tx.us/php/filer.php?acct=00067916>. Geraldine Bentley is listed as treasurer in reports filed with the Texas Ethics Commission. The Texas Ethics Commission indicates that Thiess' political committee has been "dissolved."

1 a short article by Thiess, as well as a number of photos of various federal, state, and local
2 candidates. *Id.*, Ex. B. Accompanying the photos are statements from Thiess, such as: "your vote
3 counts," "come out and vote," and "get out your vote," as well as listing "the candidates I am
4 recommending for your vote." *Id.* Additional statements include: "None of these candidates are
5 connected to each other . . . and my recommendation of them is not to be misconstrued as a slate.
6 They are my own opinions . . ." and "NO ONE has paid for my endorsement, nor offered influence
7 in return for my support." *Id.*, emphasis in original. At the end of each document is the language,
8 "All Rights Reserved. heidifortexas.com | political ad paid for by Heidi for Texas Campaign," with
9 the logo "Email Marketing by iContact." *Id.*

10 In response, Thiess states that the text in the email communications at issue reflected her
11 "own opinions" and that the communications were "not directed or paid for by any candidate."
12 Resp. at 1. Thiess contends that no express advocacy language was used in these emails, but
13 instead consisted of a "listing" of candidates she was personally voting for and who were expected
14 to appear at various events. *Id.* Thiess also states that she is not in violation of the Act's disclaimer
15 requirements because she is not registered with the Commission as a federal candidate. *Id.* Lastly,
16 Thiess maintains that she was not required to file an independent expenditure report with the
17 Commission because she did not reach the required \$1,000 filing threshold. *Id.* at 2. Thiess
18 contends that in July 2012, her state committee spent a total of \$47 in email-related expenditures
19 that mentioned the names of 21 individual candidates, amounting to "a total of \$2.23 each," which
20 she maintains "does not come close to any independent spending limits."⁴ *Id.*

⁴ Thiess' state committee reports do not disclose any payments for email-related services in July 2012. The Committee's filings show only two disbursements for "email" services in 2012: \$14.03 to "Google Apps" on April 3, 2012, and \$50.00 to "MailChimp.com" on April 18, 2012. See Texas Ethics Commission Correction Affidavit for Political Committees, 30 Days Before Election Report, dated October 16, 2012. Thiess' candidate filings, however, disclosed a \$47.00 disbursement on June 12, 2012 to "iContact" for "newsletter emailing account." See Texas Ethics Commission Correction Affidavit for Candidate/Officeholder, July Semiannual Report, dated October 16, 2012.

1 The Act prohibits a candidate for state or local office or an agent of such candidate from
2 spending any funds for public communications that qualify as “federal election activity” (“FEA”),
3 unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act,
4 52 U.S.C. § 30125(f)(1) (formerly 2 U.S.C. § 441i(f)(1)); 11 C.F.R. § 300.71. Section
5 30101(20)(A)(iii) of the Act (formerly 2 U.S.C. § 431(20)(A)(iii)) defines the term “Federal
6 election activity” to mean, among other things, “a public communication that refers to a clearly
7 identified candidate for Federal office (regardless of whether a candidate for State or local office is
8 also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or
9 opposes a candidate for that office (regardless of whether the communication expressly advocates a
10 vote for or against a candidate).” The term “public communication” means a communication by
11 means of any broadcast, cable, or satellite communication, newspaper, magazine, or any outdoor
12 advertising facility, mass mailing or telephone bank to the general public, or any other form of
13 general public political advertising. 52 U.S.C. § 30101(22) (formerly 2 U.S.C. § 431(22));
14 11 C.F.R. § 100.26. However, the term “general public political advertising” shall not include
15 communications over the Internet, except for communications placed for a fee on another person’s
16 website. 11 C.F.R. § 100.26.⁵

17 The emails from the Committee did contain language and images that clearly identified
18 candidates for Federal office — including photos of U.S. Senate candidate Ted Cruz and U.S.
19 House candidate Felicia Harris (TX-14) — and in which Thiess stated that she was “appealing . . .

⁵ Permissible Internet activities include, but are not limited to, sending or forwarding electronic mail, providing a hyperlink to a website, creating, maintaining or hosting a website and paying a nominal fee for the use of a website. 11 C.F.R. § 100.94(b). See *Internet Communications*, 71 Fed. Reg. 18590 (April 12, 2006). See also MUR 5973 (Warren County Democratic Committee) (local committee’s website activity was permissible and did not trigger political committee status); MUR 6269 (Tarkanian for Senate, *et al.*) (Internet ad placed by gubernatorial campaign was not a “public communication”). The Commission does not consider email to be a form of “general public political advertising” because there is virtually no cost associated with sending email communications. Thus, the definition of “public communication” does not encompass email communications. *Internet Communications*, 71 Fed. Reg. 18596, 18597 (April 12, 2006). See 52 U.S.C. § 30101(22) (formerly 2 U.S.C. § 431(22)) and 11 C.F.R. § 100.26.

1 to come out and vote,” that this was an “opportunity to send a message to . . . D.C.” and that “your
2 vote counts.” Compl., Ex. B. The emails then listed the candidates that Thiess was “recommending,
3 for your vote,” including Cruz and Harris. *Id.* While the emails from the Committee refer to clearly
4 identified candidate(s) for Federal office, and appear to promote or support candidate(s) for Federal
5 office, they do not qualify as federal election activity, because they do not fall under the definition
6 of “public communications.” 11 C.F.R. § 100.26. Therefore, the funds spent on the emails need
7 not be subject to the limitations, prohibitions, and reporting requirements of the Act.

8 Generally, 52 U.S.C. § 30120 (formerly 2 U.S.C. § 441d) requires certain communications
9 to carry a disclaimer identifying who paid for the communication. More specifically, Commission
10 regulations provide that all “public communications,” as defined by 11 C.F.R. § 100.26, that
11 expressly advocate the election or defeat of a clearly identified candidate must include a disclaimer.
12 11 C.F.R. § 110.11(a)(2). Here, as discussed above, the emails do not fall under the definition of
13 “public communications,” and thus were not required to include disclaimers as defined in the Act.
14 See 52 U.S.C. § 30120 (formerly 2 U.S.C. § 441d); see also MUR 6673 (David Lee for Supervisor
15 2012) (disclaimer was not required on a non-“public communication”). Furthermore, disclaimers
16 are not required on emails by “persons other than political committees.” *Internet Communications*,
17 71 Fed. Reg. 18,589, 18,600-01 (April 12, 2006) (Explanation and Justification); see also MUR
18 6548 (Eric for Texas Campaign, *et al.*) (disclaimers not required on emails sent by private citizen).

19 The Complaint alleges that the Committee should have filed an independent expenditure
20 report with the Commission, but failed to do so, in violation of 52 U.S.C. § 30104(c) (formerly
21 2 U.S.C. § 434(c)). The term “independent expenditure” means an expenditure by a person for a
22 communication expressly advocating the election or defeat of a clearly identified candidate that is
23 not made in cooperation, consultation, or concert with, or at the request or suggestion of, a
24 candidate, a candidate’s authorized committee, or their agents, or a political party committee or its

1 agents. 11 C.F.R. § 100.16.⁶ Every person that is not a political committee, and that makes
2 independent expenditures aggregating in excess of \$250 with respect to a given election in a
3 calendar year, is required to file a verified statement or report on FEC Form 5. 11 C.F.R.
4 § 109.10(b); *see also* 52 U.S.C. § 30104(c) (formerly 2 U.S.C. § 434(c)).

5 The Complaint did not provide, and we have no information suggesting, that the costs
6 associated with the emails at issue were in excess of \$250, or that Thiess made any other
7 independent expenditures during the calendar year. In the Response, Thiess specifically rebuts the
8 Complainant's allegation that the Committee spent over \$250 on the emails, an assertion that is
9 reflected in the Committee's reports filed with the Texas Ethics Commission, and the Complaint
10 provided no information otherwise. In the absence of such information, and given the generally *de*
11 *minimis* costs associated with Internet communications, we recommend that the Commission find
12 no reason to believe that the Committee or Heidi Thiess violated 52 U.S.C. § 30104(c) (formerly
13 2 U.S.C. § 434(c)).

14 Therefore, the Office of General Counsel recommends that the Commission find no reason
15 to believe Heidi for Texas Campaign, Inc., and Heidi Thiess, violated the Act or Commission
16 regulations with respect to the allegations in this matter, approve the attached Factual and Legal
17 Analysis and the appropriate letters, and close the file.

18

⁶ The definition of "person" includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11) (formerly 2 U.S.C. § 431(11)).

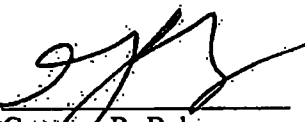
RECOMMENDATIONS

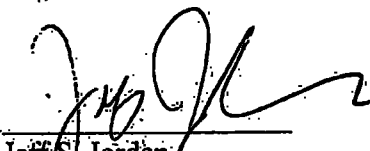
1. Find no reason to believe Heidi for Texas Campaign, Inc., and Heidi Thiess, violated the Act or Commission regulations.
2. Approve the attached Factual and Legal Analysis and the appropriate letters; and
3. Close the file.

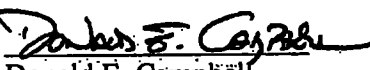
General Counsel

10/22/14
Date

BY:


Gregory R. Baker
Deputy General Counsel


Jeff S. Jordan
Assistant General Counsel
Complaints Examination
& Legal Administration


Donald E. Campbell
Attorney
Complaints Examination
& Legal Administration